APPENDIX

JUN 19 1973

In The

Supreme Court of the United States

October Term, 1972

No. 72-463

Robert L. Kunzig, Administrator, General Services Administration, *et al.*,

Petitioners,

—v.—

Jeannie M. Murray

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 8, 1972

CERTIORARI GRANTED MARCH 19, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-403

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX TO APPENDIX *

	Page
Judicial Proceedings:	
Relevant Docket Entries	1
In the United States District Court for the District of Columbia:	
Plaintiff's Complaint	2
Plaintiff's Affidavit	6
Affidavit of Thomas J. McGrew	7
5 C.F.R. 315.801-315.807	9
Federal Personnel Manual, ch. 315, Section 8(4)	12
Appeal to Civil Service Commission	19
Letter of GSA dismissing plaintiff	25

* The court of appeals' opinion, judgment, supplemental opinion, order denying rehearing and order denying suggestion for rehearing *en banc* and the district court's memorandum opinion are not reprinted in this appendix since they are already printed as appendices to the petition.

INDEX TO APPENDIX

Page

In the United States District Court for the District of Columbia:—Continued

Plaintiff's Performance Rating of April 28, 1971 27
Review of ODASCO Landscape Evaluation 28
Plaintiff's Motion for Temporary Restraining Order 32
Temporary Restraining Order of May 28, 1971 33
Plaintiff's Motion for Preliminary Injunction 34
Defendants' Motion to Dismiss 35
Temporary Restraining Order of June 4, 1971 36
Transcript of Proceedings on June 4, 1971 37

Order Allowing Certiorari 45

RELEVANT DOCKET ENTRIES

No. 1053-71 in the United States District Court for the District of Columbia

Date	Filings—Proceedings
1971	
May 28	Complaint filed; Motion for Temporary Restraining Order filed; Motion for Temporary Restraining Order granted.
June 3	Plaintiff's Motion for preliminary injunction; Motion of defendant to dismiss
June 4	Order continuing temporary restraining order of May 28 until appearance of W. H. Sanders
June 7	Hearing begun and concluded
July 20	Notice of appeal by defendants from order of June 4
	No. 71-1586 in the United States Court of Appeals for the District of Columbia Circuit
July 26	Record on appeal docketed in court of appeals
1972	
February 29	Judgment of the court of appeals affirming order of the district court
April 27	Judgment of the court of appeals denying appellants' petition for rehearing
April 27	Order of the court of appeals denying appellants' suggestion for rehearing *en banc*.
	No. 72-043 in the Supreme Court of The United States
Sept. 8	Petition for certiorari filed
1973	
March 19	Petition for certiorari granted

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PROHIBITORY AND MANDATORY INJUNCTION AND OTHER RELIEF

Plaintiff, Jeanne M. Murray, complains against the Defendants named above as follows:

1. This is an action for a prohibitory injunction restraining Defendant Kunzig, his representatives and subordinates, from terminating Plaintiff's employment as a Program Analyst GS-13 with the General Services Administration until such time as the United States Civil Service Commission can pass on her appeal. In the alternative, Plaintiff seeks a declaratory judgment that the Defendants action in terminating her is unlawful and void.

2. Plaintiff asserts that the termination of her employment was in violation of her rights under Civil Service Regulations, 5 C.F.R. § 315.805, and Ch. 315, Subchapter 8, ¶ 4(b) of the Federal Personnel Manual.

3. This action arises under the laws of the United States. The jurisdiction of this Court is based on 28 U.S.C. §§ 1331, 1361, 2201, 2202; District of Columbia Code, Title 11, § 521; and the Administrative Procedure Act, 5 U.S.C. § 702. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e). The amount in controversy in this case exceeds $10,000, exclusive of interests and costs.

4. Plaintiff, Jeanne M. Murray, is a probationary employee holding the position of Program Analyst GS-13 in the Public Buildings Service of the General Services Administration. Defendant Kunzig is the Administrator of General Service. Defendant Sampson is the Commissioner of the Public Buildings Service. The official residence of both Defendants is the District of Columbia.

5. On May 20, 1971, Mrs. Jeanne M. Murray was given a letter informing her of her separation from her position of Program Analyst. The letter cited "unwilling-

ness to follow office procedure and to accept directions from [her] superiors" as the reasons for her termination. Her termination was to become effective on May 29, 1971. (A copy of this letter is attached hereto as Exhibit A to Appendix II.) On May 25, 1971, counsel for Mrs. Murray, Messrs. John T. Rigby and Thomas J. McGrew, were shown by Mr. Stan Maher, a Personnel Officer of the GSA, a memorandum which gave the specific evidence upon which Mrs. Murray's termination was based. GSA has been unwilling to make available a copy of this memorandum. Mr. McGrew's affidavit is attached hereto as Appendix II.

6. The memorandum had been prepared to familiarize the deciding authority with the case and in accordance with Subchapter 8, ¶ 4(a)(4) of § 315 of the Federal Personnel Manual which states "although it is not required, it is good personnel practice to furnish every separated probationer with enough factual information (as distinguished from conclusions) about his performance or conduct to make the agency's basis for the action clear."

7. The memorandum recited various allegations in connection with Mrs. Murray's performance of her duties while at GSA. It stated that Mrs. Murray had made similar errors in her previous government employment by the Defense Intelligence Agency. The letter also referred to an "Appendix A" for details of the DIA allegations. Plaintiff's counsel were not shown Appendix A and Plaintiff has never seen any portion of this memorandum.

8. Plaintiff was never informed, prior to receiving her termination that the GSA was considering any alleged prior conduct of hers. She was never afforded, either formally or informally, an opportunity to explain or rebut these charges. Even after the decision was taken to terminate her, Defendants have been unwilling to discuss these charges or provide any opportunity for reply.

9. All of this is in violation of Plaintiff's rights under 5 C.F.R. § 315.805, and § 315 Subchapter 8, ¶ 4(b) of the Federal Personnel Manual.

The Federal Personnel Manual, implementing 5 C.F.R.

§ 315.805, provides:

"8-4. SEPARATION OF PROBATIONERS

* * * *

b. For conduct before appointment. (1) When an agency initiates the termination of a probationer for reasons *based in whole or in part on his conduct before employment* . . . the probationer is entitled to notice in advance, a specific and detailed statement of the reasons, the right to reply, consideration of his reply, a decision, and information on his right to ask the Commission to review the *procedure* by which he was separated." C. 315 (emphasis in original.)

10. Plaintiff's information is that her personal file at the Defense Intelligence Agency contains nothing derrogatory to her, but, rather, contains consistently high performance ratings.

11. On May 27, 1971, the GSA notified Plaintiff's counsel that it saw no reason to afford Mrs. Murray a hearing on this matter or any other issue connected with her termination. Immediately thereafter, Plaintiff filed an appeal with the United States Civil Service Commission, which appeal is now pending. (A copy of Plaintiff's appeal is attached hereto as Appendix III.)

12. As a result of the unlawful action by the Defendants, Mrs. Murray may be deprived of her income for an indefinite period of time, and spurious and unrebutted charges against her may remain on the record. She has, moreover, suffered the embarrassment of being wrongfully discharged in the presence of her co-workers.

13. A temporary restraining order enjoining Defendant Kunzig, his representatives and subordinates from terminating Mrs. Murray's employment is essential to prevent immediate and irreparable injury to Plaintiff pending the decision on the merits by this Court or the United States Civil Service Commission. Plaintiff does not have any other adequate remedy at law.

WHEREFORE, Plaintiff prays:

(a) That a temporary restraining order and a prohibitory injunction be issued enjoining Defendants, their

representatives and subordinates, from terminating Mrs. Murray's employment pending a decision on the merits;

(b) That this Court declare and adjudge that Defendants, their representatives and subordinates, have unlawfully terminated Mrs. Murray's employment, as a Program Analyst GS-13 with the General Services Administration;

(c) That Defendants, their representatives and subordinates be permanently enjoined from terminating Mrs. Murray's employment without affording her an opportunity for notice of the charges against her and an opportunity to rebut said charges;

(d) That Defendants, their representatives and subordinates, be ordered to expunge from their records all matters flowing from Plaintiff's unlawful termination;

(e) That Defendants, their representatives and subordinates, be enjoined from making and disseminating statements derogatory to Plaintiff unless Plaintiff has been afforded an opportunity to rebut such statements and bone fide consideration has been given to her response; and

(f) That Plaintiff be awarded such other and further relief as may be just and equitable under the circumstances.

Respectfully submitted,

ARNOLD & PORTER

By /s/ John T. Rigby
JOHN T. RIGBY

By /s/ Thomas J. McGrew
THOMAS J. MCGREW
Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

JEANNE M. MURRAY, being first duly sworn, deposes as follows:

1. I am presently employed by the Public Buildings Service of the General Services Administration (GSA) as a Program Analyst, GS-13.

2. On May 20, 1971, at approximately five p.m., I was given a letter signed by Mr. W. H. Sanders, Acting Commissioner of the Public Buildings Service, informing me that my employment was to be terminated as of Saturday, May 29, 1971.

3. I have never been told that GSA's Personnel files contain adverse information about my service in the Defense Intelligence Agency (DIA), nor have I ever seen a memorandum dealing with my employment there.

4. I worked for slightly over a year at the DIA, and I have been informed by the Acting Chief of Staff of the DIA, Rear Admiral D. E. Bergin, that my personnel file at DIA contains nothing derogatory to me.

5. In recent weeks, I was informed by Mr. William Mulroney, a DIA employee, that someone from GSA had been making inquiries of DIA personnel about my term of service there.

JEANNE M. MURRAY

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF THOMAS J. McGREW

WASHINGTON,)
) ss:
DISTRICT OF COLUMBIA)

THOMAS J. McGREW, being first duly sworn, deposes as follows:

1. I am a member of the Bar of this Court and an attorney for Mrs. Jeanne M. Murray, Plaintiff in the above-entitled case.

2. On the morning of May 25, 1971, John T. Rigby, Esq. and I met with Mr. Stan Maher of the Office of Personnel, General Service Administration (GSA), to discuss GSA's termination of Mrs. Murray's employment.

3. In reply to a request for specifics as to the charges against Mrs. Murray, Mr. Maher produced a memorandum which, he stated, had been proposed to familiarize the Commissioner of the Public Buildings Service with Mrs. Murray's case. He told us that the Commissioner alone has the authority to terminate Mrs. Murray's employment.

4. The memorandum contained a general statement of aspects of Mrs. Murray's conduct and attitude which had led to a problem within GSA. It also contained a statement that she had identical problems while previously employed by the Defense Intelligence Agency (DIA) and that the very high ratings on all aspects of her performance at DIA were misleading in that the person who rated her was not her actual supervisor. For further information on Mrs. Murray's DIA experience, the reader was referred to Appendix A of the memorandum, Mr. Rigby and I were not shown Appendix A.

5. Upon returning to our office, I sent a letter to Mr. Maher with regard to the use of the DIA materials. A copy of that letter is attached hereto as Exhibit A.

6. In telephone conversations on May 26, 1971, Mr. Maher told me that he was still seeking an answer to our request for a hearing but that the question of providing us with a copy of the memorandum was in the hands of David Fisher, Esq., of the GSA General Counsel's Office.

7. In a telephone conversation on the morning of May 27, 1971, Mr. Fisher told me that he did not possess the authority to give us a copy of the memorandum but that he would pass on my request and call me back.

8. In the afternoon of May 27, 1971, Mr. Fisher called to deny my request for a copy of the memorandum and Mr. Maher called to deny my request for a hearing. I then telephoned Mr. Herman Staiman of the Appeals Examining Office of the Civil Service Commission to ask if the Commission could take action in Mrs. Murray's case on an expedited basis because of the imminence of Mrs. Murray's termination date, May 29, 1971. Mr. Staiman told me that the Commission's case load did not permit this.

9. On the morning of May 27, 1971, I caused a copy of Mrs. Murray's appeal to be delivered by hand to the Chief, Appeals Examining Office, Civil Service Commission, 1900 "E" Street, N.W., Washington, D.C. 20415.

THOMAS J. MCGREW

Subpart H—Probation

§ 315.801 Probationary period; when required.

(a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period when the employee:

(1) Was appointed from a register;

(2) Was reinstated under § 315.401, unless during any period of service which affords a current basis for reinstatement, the employee completed a probationary period or served with competitive status under an appointment which did not require him to serve a probationary period;

(3) Was appointed under § 315.601(a) as a former employee of the Canal Zone Merit System, unless he satisfactorily completed a 1-year probationary period under that system;

(4) Was appointed under § 315.603(a)(2) on the basis of his former incumbency of a position brought into the competitive service;

(5) Has had his employment converted under § 315.701 or § 315.703 from another type of employment; or

(6) Was appointed under § 315.605 as a former Peace Corps volunteer or volunteer leader.

(b) A person who is:

(1) Transferred under § 315.501; or

(2) Promoted, demoted, or reassigned; before he completed probation is required to complete the probationary period in the new position.

(c) A person who is reinstated from the Reemployment Priority List to a position in the same agency and the same commuting area does not have to serve a new probationary period, but if separated during probation, is required to complete the probationary period in the new position.

§ 315.802 Length of probationary period.

(a) The probationary period required by § 315.801 is 1 year.

(b) The Commission shall publish in the Federal Personnel Manual a statement of the conditions under which

prior service is counted toward completion of a probationary period.

§ 315.803 Agency action during probationary period (general).

The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

§ 315.804 Termination of probationers for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period falls to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

§ 315.805 Termination of probationers for conditions arising before appointment.

When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(a) *Notice of proposed adverse action.* The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest

practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

§ 315.806 Appeal rights to the Commission.

(a) *Right of appeal.* An employee may appeal to the Commission in writing an agency's decision to terminate him under § 315.804 or § 315.805 only as provided in paragraphs (b) and (c) of this section. The Commission's review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) *On discrimination.* (1) An employee may appeal under this subparagraph a termination which he alleges was based on discrimination because of race, color, religion, sex, or national origin. The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.

(2) An employee may appeal under this subparagraph a termination not required by statute which he alleges was based on political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap.

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

(d) *Time limits.* An employee may submit an appeal at any time after receipt of the notice of adverse decision, but not later than 15 calendar days after the termination has been effected. The Commission may extend the time limit in this paragraph when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit. [33 F.R. 12418, Sept. 4, 1968, as amended at 34 F.R. 5367, Mar. 18, 1969]

§ 315.807 Agency action when Commission recommends restoration or other corrective action.

(a) It is mandatory that the agency take all corrective action recommended in the Commission's initial decision on an appeal unless it makes a timely appeal to the Board of Appeals and Review.

(b) The decision of the Board is final and compliance with its recommendation for corrective action is mandatory.

FEDERAL PERSONNEL MANUAL CH. 315, SECTION 8(4)

SEPARATION OF PROBATIONERS

a. For unsatisfactory performance or conduct. (1) A person selected for appointment through competitive examination is presumed to possess the skills and character traits necessary for satisfactory performance as a career employee. That presumption, however, must be verified through demonstrated capacity during the probationary period. If the appointee fails to demonstrate these characteristics after full and fair trial, his separation for disqualification is proper. This action may be based upon deficiency in duty performance, lack of aptitude or cooperativeness, or undesirable suitability characteristics evidenced by his activities either during or outside official working hours.

(2) Termination action should be initiated whenever the probationer's work performance or conduct fails to demonstrate his fitness or his qualifications for continued Federal employment. Obviously, a decision to terminate should not be made in haste or until the employee has had a full and fair trial. The length of such a trial cannot be described in terms of so many days, weeks, or months. It is whatever time it takes for the agency to appraise the employee's postappointment performance and conduct carefully and to arrive at a considered judgment whether he should be retained or separated.

(3) When separation action is based entirely on deficiencies in performance or conduct *after entrance on duty*, the probationer is notified in writing why he is

being terminated and the effective date of the action. The information in the notice on why he is being terminated must, at a minimum, consist of the agency's conclusions on the inadequacies of his performance or conduct; it need not require complete and specific reasons as with career or career-conditional employees who have completed their probationary periods and have competitive status. The employee is not given a right of reply.

(4) Although it is not required, it is good personnel practice to furnish every separated probationer with enough factual information (as distinguished from conclusions) about his performance or conduct to make the agency's basis for the action clear. One way to accomplish this is to have an appropriate supervisory or personnel official discuss the basis for the agency's action with the employee.

(5) An employee covered by this paragraph may appeal to the Commission on the grounds that his termination was based on discrimination because of race, color, religion, sex, or national origin. An appeal of this kind must be submitted within the time limit prescribed in subparagraph (7). The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.

(6) An employee covered by this paragraph may appeal to the Commission a termination not required by law which he alleges was based on political reasons or marital status, or a termination which he alleges resulted from improper discrimination because of physical handicap. Such an appeal must be submitted within the time limit prescribed in subparagraph (7).

(7) An appeal to the Commission under subparagraph (5) or (6) may be filed at any time after receipt of the notice of adverse decision, but no later than 15 calendar days after the termination has been effected. This time limit may be extended, at the discretion of the Commission, upon a showing by the employee that he was not notified of the time limit and was not otherwise aware of it, or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

b. For conduct before appointment. (1) When an agency initiates the termination of a probationer for reasons *based in whole or in part on his conduct before employment* (such as the intentional falsification of application forms or other preappointment documents), the probationer is entitled to notice in advance, a specific and detailed statement of the reasons, the right to reply, consideration of his reply, a decision, and information on his right to ask the Commission to review the *procedure* by which he was separated. This requires the agency to give the probationer substantially the same consideration he would have received from the Commission as an applicant, if the derogatory information had come to light before he was appointed.

(2) The notice must state the reasons with sufficient specificity and detail for the employee to be able to understand them and reply to them. It must inform him that he may reply in writing and submit affidavits in support of his reply. It identifies the person or persons or office to receive a reply, and must fix a reasonable time for its preparation and return. The length of time allowed is governed by the difficulty of preparing a reply to the allegations made.

(3) An agency may want to separate a probationer on the basis of information in a Commission report of investigation. When, however, this is information which was secured by the Commission under a pledge of confidence—as opposed to information secured from public records, law enforcement records, or Federal personnel records which could be obtained on request by the employer—the agency is prohibited from using the information in any way which would disclose its source to the employee. At the same time, the agency is required to give the probationer a specific and detailed statement of its reasons for taking action against him; the requirement for specificity and detail is not set aside by the restricted nature of a Commission investigative report, even when the report supplies the reason for the action. There is no restriction, on the other hand, against using the particular information in question if it is obtained

independently by the agency. This may be done as follows:

(a) The employee himself may furnish the necessary information. An interview with the employee is often the best means of developing information concerning previous discharges from employment and other such matters.

(b) The agency may contact the sources named in the Commission's investigative report and obtain their permission to use the information.

(c) The agency may find it possible to obtain the same information from other sources.

(4) The probationer is not entitled to an examination of witnesses nor to a trial or hearing, except at the discretion of the employing agency.

(5) Bona fide consideration must be given to the employee's answer. If the charges are rebutted successfully the employee should be notified that they are being dropped. If mitigating circumstances are present the agency may decide that a lesser penalty than separation from the service is appropriate.

(6) If the agency decides that the employee is to be separated, he must be furnished a written decision on the proposed separation. This notice should be delivered to him as much in advance of the effective date as possible. It must state the reasons, clearly identifying which of the charges or reasons in the advance notice are relied on by the agency, and the effective date. It must inform the employee of his right to appeal to the proper office of the Commission at any time after receiving the decision, but no later than 15 calendar days after the separation is effected. If the employee has been serving in a *de facto* status caused by his appointment being void *ab initio*, the employee should be notified that no further payment can be made to him after receipt of adverse decision whether or not he is carried in an active duty status (38 Comp. Gen. 175, August 29, 1958). Under

these circumstances, if an employee does not want to perform services for which he cannot be paid, the agency may carry him in a nonwork status.

(7) An employee covered by this paragraph may appeal to the Commission on the grounds that his agency failed to observe the procedures described in this paragraph in effecting his termination. This is done by submitting an appeal in writing, pointing out specifically in what aspect the agency failed to comply with those procedures. Such an appeal must be submitted within the time limit prescribed in subparagraph (10).

(8) An employee covered by this paragraph may appeal to the Commission on the grounds that his termination was based on discrimination because of race, color, religion, sex, or national origin. Such an appeal must be submitted within the time limit prescribed in subparagraph (10). The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.

(9) An employee covered by this paragraph may appeal to the Commission a termination not required by law which he alleges was based on political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap. Such an appeal must be submitted within the time limit prescribed in subparagraph (10).

(10) An appeal to the Commission under subparagraphs (7), (8), or (9) may be submitted at any time after receipt of the notice of adverse decision, but no later than 15 calendar days after the termination has been effected. This time limit may be extended, at the discretion of the Commission, upon a showing by the employee that he was not notified of the time limit and was not otherwise aware of it, or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

c. Agency procedural regulations. In addition to the procedures prescribed by the Commission for terminating probationers, agencies are required to observe their own procedural regulations.

d. Mandatory character of Commission decision on appeals. (1) If the Commission decides in favor of the appellant, it is mandatory for the agency to take corrective action in accordance with the decision and recommendation, unless an appeal is made to the Board of Appeals and Review. Within seven calendar days after receipt of the decision, the agency must report to the Chief, Appeals Examining Office, or to the regional director, as appropriate, that it has carried the decision into effect or that it is appealing the decision to the Board of Appeals and Review.

(2) The decision of the Board of Appeals and Review is final and there is no further right to appeal. A recommendation for corrective action is mandatory and must be complied with by the agency. When corrective action is required, the agency must promptly report to the Board that the action has been taken.

(3) When the Commission recommends restoration of a separated employee, making a position available for him is sometimes a problem for the agency. The position from which the probationer was separated may have been filled, for instance, and the agency may not be able to comply with the restoration order without displacing one or more employees. If the restoration of a successful appellant requires a readjustment in the work force, the readjustment may be accomplished either through the reduction-in-force system or by adverse action against employees affected by the readjustment. If the latter method is used, the readjustments stemming from the restoration order must be shown to be for a cause that will promote the efficiency of the service.

e. Separation at direction of the Commission. When the Commission directs the separation of a probationer, the procedure described in paragraph b above is not required.

f. Timing of separations. In separations under paragraphs a and b above, the employee's separation from the rolls must be effected before the employee has completed his probationary or trial period. Otherwise, the procedures applicable to the separation of a career-conditional employee who has completed his probationary

period are mandatory. To separate an employee before the completion of the probationary period, an agency must separate him before the end of his tour of duty on the last day of probation, which is the day before the anniversary date. Because separations are effective at *midnight* and probationary periods are completed at the *end of a tour of duty*, it is advisable for an agency that wishes to separate a probationer to separate him no later than the day before probation will have been completed. For example:

> A probationary period begins on December 1; the tour of duty is from 8 a.m. to 4:30 p.m. Probation normally will be completed at 4:30 p.m. on November 30 of the succeeding year. A separation made effective on November 30 would become effective at midnight—after the probation has been completed. Therefore, to assure that the separation is made during the probationary period, it is advisable that it be made effective on or before November 29.

g. Processing of separations. Separations under paragraphs a and b above are processed as Termination During Probation.

May 27, 1971

Chief
Appeals Examining Office
United States Civil Service Commission
Washington, D. C.

Dear Sir:

Re: *Appeal of Mrs. Jeanne M. Murray*

At the close of business on May 20, 1971, Mrs. Jeanne M. Murray was given a letter informing her of her separation during probation from the position of Program Analyst, GS-13, by the General Service Administration (GSA),[1] effective May 29, 1971. Mrs. Murray hereby appeals to the Civil Service Commission on the grounds that (1) her separation was based in part on alleged events occuring prior to her employment by GSA without affording her notice of the charges or opportunity to reply as provided by Civil Service Regulations, 5 C.F.R. § 315.805 and Chapter 315, Subchapter 8, ¶ 4(b) of the Federal Personnel Manual and (2) her separation was in part based on political reasons. Attempts to deal with this matter within GSA having failed, this appeal is taken and, by reason of the relatively short notice afforded Mrs. Murray and the permanent adverse effect this action must have on Mrs. Murray's professional career if it goes uncorrected, expedited consideration is requested.

The first information Mrs. Murray had that matters occuring prior to her employment by GSA had been considered in her discharge was obtained by her counsel, Messrs. John T. Rigby and Thomas J. McGrew of the firm of Arnold & Porter, during a conference with Mr. Stan Maher of the GSA Office of Personnel on Tuesday, May 25, 1971. Mr. Maher informed Mrs. Murray's counsel that, in addition to the letter required by regulations, GSA had assembled the specifics on which the decision

[1] A copy of that letter is attached hereto for your convenience as Exhibit A.

to terminate Mrs. Murray was based in accordance with the practice outlined in Federal Personnel Manual, ch. 315, subch. 8, ¶ 4(a)(4).

In this regard, Mr. Maher showed counsel a memorandum detailing for the convenience of the Commissioner of the Public Buildings Service the allegations against Mrs. Murray. That memorandum contained allegations that Mrs. Murray had had certain difficulties while previously employed at the Defense Intelligence Agency (DIA). For specifics on the DIA information, it referred the reader to an "Appendix A" which counsel were not shown. Prior to this time, Mrs. Murray had been given no hint that any such derrogatory information existed or would be used against her. The GSA has refused counsel's repeated requests for a copy of this memorandum.

The Federal Personnel Manual, implementing 5 C.F.R. § 315.805, provides:

> "8-4. SEPARATION OF PROBATIONERS
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> • • • •
>
> b. For conduct before appointment. (1) When an agency initiates the termination of a probationer for reasons *based in whole or in part on his conduct before employment* . . . the probationer is entitled to notice in advance, a specific and detailed statement of the reasons, the right to reply, consideration of his reply, a decision, and information on his right to ask the Commission to review the *procedure* by which he was separated." C. 315 (emphasis in original).

Mrs. Murray remains unaware of the nature of the allegations reported. She has been led to believe, however, that her superiors at DIA invariably found her job performance to be excellent and that the personnel files at DIA contain no derrogatory information about her.[2] The information used is quite likely to be no more than un-

[2] Mrs. Murray was so informed by a responsible official of DIA at the time she left that agency.

proven office gossip. She is, therefore, clearly prejudiced by being denied her right to reply to these charges.

The memorandum in question, including any appendices, was clearly before the decision-making authority at GSA and formed the basis for his decision. Its contents are, short of an attempt to psychoanalyze the deciding authority, the only available record of the reasons for Mrs. Murray's termination. At this point, no one can genuinely reconstruct the process of decision. The DIA story may have been taken as showing that the charges at GSA were more probable. It may have been a factor in ruling out a transfer or other action short of separation[3] on some theory of general incorrigibility. Whatever can be said of such conjecture, pro or con, the fact is that the memorandum is 100 percent of the available, contemporaneous record of the decision-making process. Nor does the law permit such speculation. In order for any review function to exist, "[t]he grounds upon which an administrative order must be judged are those upon which the record disclosed it was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 271 (1960). "[N]othing is clearer than the principle that we examine the [agency's] reasons and not the subsequent rationalizations of its counsel." *Trailways of New England* v. *CAB*, 412 F.2d 926, 931 (1st Cir., 1969). Likewise, it is clear that, in view of the wide spectrum of actions available to an agency short of terminating an employee, such as warning, transfer or suspension, the use of illegal and prejudicial information can not be termed "harmless error". *Meehan* v. *Macy*, 392 F.2d 822, 839 (D.C. Cir. 1968); *Burkett* v. *United States*, 402 F.2d 1002, 1006 (Ct. Cl. 1968).

Given that these stories were submitted to the deciding authority and that Mrs. Murray was never afforded her

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[3] The Manual clearly contemplates this possibility

> "Bona fide consideration must be given to the employee's answer. If the charges are rebutted successfully the employee should be notified that they are being dropped. *If mitigating circumstances are present the agency may decide that a lesser penalty than separation is appropriate.*" c. 315, subch. 8, ¶ 4 (b) (5) [emphasis added]

right to notice and an opportunity to reply, the decision to terminate her is clearly illegal and must be reversed on this ground alone. She should therefore be reinstated.

As to the events occuring at GSA, the crux of the matter is a disagreement, occuring on or about April 12, 1971, between Mrs. Murray and her immediate superior, Mr. John Stanbury. It was Mrs. Murray's understanding —and this is now confirmed by the GSA memorandum itself—that she and Mr. Stanbury got along well until April 12 and had considerable difficulties thereafter. The dramatically changed attitude on Mr. Stanbury's part is documented by a memorandum he sent her [4] on April 28, making clear that he had been satisfied with her performance up until early April but that something in the interim had changed his attitude radically.[5]

The event which caused the falling out between Mrs. Murray and her immediate superior on April 12 was a memorandum [6] written by Mrs. Murray evaluating the reasons that a particular program designed to improve governmental efficiency was unsuccessful. Mr. Hall, Mr. Standbury's superior, had requested Mrs. Murray's views on this matter. Mrs. Murray concluded that the program in question had never been properly implemented with the result of causing a staggering amount of waste and inefficiency. Her memorandum was designed to call this matter to the attention of her superiors in the Public Buildings Service. This document was sent through the proper channels and appropriate procedures were at all times followed. Mr. Stanbury took great exception to the memo on the grounds that, in effect, Mrs. Murray was "making waves". He told her that, because she had sent this memorandum, he would arrange to "get" her.

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[4] The memorandum is attached hereto for your convenience as Exhibit B.

[5] It can not be overemphasized that, at no point in this dispute has Mr. Stanbury, or anyone else, questioned Mrs. Murray's technical ability to perform her work. To the contrary, he relied on Mrs. Murray for substantial assistance in doing his term papers.

[6] A copy of which is attached hereto for your convenience as Exhibit C.

The subsequent history of this case dramatically illustrates the power of a superior government official to carry out such a threat. Mrs. Murray immediately found herself in an impossible situation. She was accused of taking a careless attitude toward the protection of government files, but, when she purchased a lock to secure certain important project files in her desk, she was accused of locking her desk in violation of "office procedure". She heard, at second hand, reports misrepresenting her remarks during conversations, but, when she thereafter insisted on communicating important matters by memorandum, she was accused of refusing to communicate directly with her superiors. The upshot was that no action which Mrs. Murray could possibly have taken would prove her innocence.

Since this situation did not exist prior to the memorandum incident on April 12 and began immediately thereafter, the only reasonable inference is that Mrs. Murray was being subjected to retaliation for daring to write about governmental inefficiencies and waste. The right of a governmental employee to criticize actions of his employer through proper channels is clearly guaranteed by the First Amendment to the United States Constitution. *Pickering* v. *Board of Education*, 391 U.S. 563, 569 (1968). Such violations of First Amendment liberties are reviewable as political discrimination by this Commission, *Holden* v. *Finch*, —— F.2d ——, Slip Op. No. 23,523 (D.C. Cir. May 17, 1971), and by the courts, *Battle* v. *Mulholland*, —— F.2d ——, 3 C.C.H. Empl. Prac. Bull. ¶ 8150 (5th Cir. March 23, 1971).

Mrs. Murray's dismissal and the events leading up to it have successfully kept the question of whether her opinion was in fact correct from ever being faced up to by those whose duty it is to know. The answer to that question may very well never be known, and it is certainly not before this Commission. But, it is submitted that there is an overwhelming public interest that such questions be raised and that those who raise them not be shuffled out of government.

For the reasons given above, the GSA's decision must be reversed and Mrs. Murray ordered reinstated.

Respectfully submitted,

JOHN T. RIGBY
THOMAS J. MCGREW

ARNOLD & PORTER
1228 19th Street, N.W.
Washington, D. C. 20036
Telephone: 202-223-3200

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

[GSA Emblem]

Public Buildings Service
Washington, D.C. 20405

MAY 20, 1971

Mrs. Jeanne M. Murray
Policy and Planning Division
Office of the Executive Director
Public Buildings Service
Washington, D. C. 20405

Dear Mrs. Murray:

The purpose of this letter is to inform you of your separation from your position of Program Analyst. You are being separated during your probationary period for the reasons that you have shown complete unwillingness to follow office procedure and to accept direction from your supervisors. Your last day in a pay status will be May 29, 1971, and you will be paid for any annual leave due you under current regulations.

You have no right of reply unless you feel this termination was based on discrimination because of race, color, religion, sex, national origin, political reasons, marital status, or phyical handicap. Should you desire to appeal this action based on discrimination, you may appeal to the Chief, Appeals Examining Office, U. S. Civil Service Commission, Washington, D. C. at any time after receipt of this notice, but not later than fifteen calendar days after the termination is effected. Your appeal should (1) be in writing; (2) identify appellant, the agency, the and effective date of the action appealed, and (3) state the reasons why you believe the action appealed is improper.

Mr. Stan Maher, of the Office of Personnel, is available to discuss this matter with you, if you so desire. He is

located in Room 1116, of the General Services Building, and can be reached on 343-6125.

The necessity of this action is regretted.

Sincerely,

W. H. SANDERS
Acting Commissioner
Public Buildings Service

NOTIFICATION OF SATISFACTORY RATING

NAME	PERIOD
Jeanne M. Murray	1/5/71-4/5/71

Your performance has been rated as satisfactory during the indicated period.

RATING OFFICIAL (Signature)	DATE
/s/ John L. Stanbury JOHN L. STANBURY	4/28/71 4/28/71 J.L.S.

Executive Director, PBS—PF

Review of ODCASO Office Landscape Evaluation Report One

A. F. Sampson—P
Commissioner, Public Buildings Service

This report deals with the building shell, furnishings and equipment, and acoustics of the ODCASO Office Landscape Test Project. It presents the following figures on space utilization in the area:

The conventional layout provided an average of 115.04 square feet per employee, and the O.L. plan provided 113.33 square feet per employee. The space savings achieved in this project are minor. The use of microfilmed documents in work areas is a promising method of improving space utilization and should be investigated.

A detailed record of some of the problems with furniture, ceiling baffles, etc., has already been reported. Procedures for solving these problems have been devised, and personnel assigned to carry them out.

Some acoustical testing has also been carried out, and changes are in progress to improve the acoustical privacy of the area. Some of these tests and changes are described in the report.

The evaluation efforts on the ODCASO project are somewhat disappointing, and a concentrated effort is being made to discover the reasons for this. Some of the findings are set forth below.

The total systems approach employed in the analysis of the communications aspects, workflow, records management, etc., of the ODCASO Project produced some significant figures. For example, in one work group of twenty-two people, it was discovered that nine persons checked the printouts against the schedules when errors ranged from only one to two percent. Complete analysis

of this group revealed that through management techniques this group could be more effective as follows:

	Existing	New Preliminary	Percent of Reduction
Workstations	30	20	33%
Worksteps	71	39	45%
Persons involved in ODCASO alone	22	8	60%
Time (days)	8	4	50%
Information Carriers in ODCASO alone	23	11	50%

Quantity of paper can be reduced by 70%

The redundancy of task performances and paper flows within this one group provided an indication of the *magnitude* of the management problems which can be revealed through total systems analysis.

Implementation of the recommendations resulting from the ODCASO analysis would have increased the effectiveness of the group at the expense of creating grave problems for the persons displaced. As a result, the area was provided with the cosmetic factors of office landscaping, but very few of the analytical studies in progress are necessarily incomplete.

In the light of this, as a feasible, temporary measure, it is recommended that the ODCASO Office Landscape Evaluation Report One be accepted, and that the suggestions by the Assistant Commissioner for the six-months' report be accepted.

The foregoing information is not intended to be derogatory, but to point out the significance of the ODCASO Test Project. Total systems analysis is a management tool which will continue to produce evidence of the type revealed in the ODCASO Project. The task of management is to make constructive use of the information obtained from such studies.

GSA, as a large organization with broadly diversified functions, can provide leadership, in improving Government operations, to other agencies by grasping the opportunity presented by the findings of the ODCASO study. Management scientists have advocated for the past twenty years that people not be displaced by changes, but that they be retrained—in house—for labor shortage areas.

GSA, as a service organization, is acutely aware of labor shortages, within GSA, in service categories. With this in mind, why not incorporate the total systems approach to analysis of some of GSA's open space office management areas? If the findings reveal serious overstaffing and ineffectiveness in these areas, why not *retrain the surplus personnel, as employees,* to serve some needed function in the organization?

GSA can also provide leadership here by opening up opportunities for women. For example, why couldn't surplus clerks, both men and women, be trained as mechanics to service GSA's large fleet of motor vehicles?

Service functions can be made attractive by proper motivation techniques. As an example, the airlines have transformed the essentially cooking and serving functions of its flight stewardesses by labeling these employees "hostesses," providing them with attractive uniforms, and paying them an adequate wage. These jobs are widely sought. This type of motivation could be successfully implemented for many, much-needed services in GSA, and an organization of effective people in a balanced employment situation could result.

There are many problems associated with such a pioneering effort, such as dealing with the rigid, categorized employment rules of the Civil Service Commission.

However, these problems are not insurmountable, and GSA has much to gain in taking the lead in such a program.

I. E. FRIEDLANDER

Enclosure

cc: Official File—PFPA
Mr. Hall—PFP
Mr. Price—PL
Mr. Friedlander—PF

Ticket No. 112 Due: 4-12-71

PFPA:JMURRAY:pbe X6816

Concurrences: PFP _____ PL _____

Actg. Dir., Policy & Planning

Confd. Assistant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff hereby moves this Court for a temporary restraining order in the form attached hereto.

This motion is based on the grounds that immediate and irreparable injury, loss and damage will result to plaintiff unless the motion is granted, as more particularly appears from the complaint and affidavits herein, together with attached exhibits.

Respectfully submitted,

ARNOLD & PORTER

JOHN T. RIGBY

THOMAS J. MCGREW

Attorneys for Plaintiff

1229 Nineteenth Street,
N.W.
Washington, D.C. 20036
223-3200

Dated: May 28, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

TEMPORARY RESTRAINING ORDER

It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending final hearing on the merits by the Civil Service Commission, should issue because, unless defendants are restrained from terminating plaintiff's employment, plaintiff may suffer immediate and irreparable injury, loss and damage before a hearing can be had on plaintiff's claim,

NOW, THEREFORE, IT IS ORDERED, that defendants, their agents, officers, servants, employees, and attorneys, and any person in active concert or participation with them, be and they are hereby restrained until the determination of plaintiff's application for an injunction and other relief, from, directly or indirectly:

(a) Terminating plaintiff's employment as a Program Analyst, GS-13, by the General Services Administration; and

(b) Taking any other steps, directly or indirectly, to implement, effectuate or in any way carry out the said termination.

IT IS FURTHER ORDERED that the 4th day of June, 1971, at 3 o'clock, p.m., at the United States Courthouse in Washington, D.C., is fixed for the time and place of hearing plaintiff's application for an injunction and other relief.

IT IS FURTHER ORDERED that a copy of this order be served by the United States Marshal on Defendant forthwith.

/s/ Oliver Gasch
United States District Judge

Issued at 12 o'clock 55 p.m.
This 28th day of May, 1971.

[Attest and Plaintiff's Undertaking Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Jeanne M. Murray, Plaintiff in the above-entitled case, moves this Court for a Preliminary Injunction for the reasons set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

JOHN T. RIGBY
THOMAS J. MCGREW
Attorneys for Plaintiff

ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036
Telephone: 202-223-3200

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

MOTION TO DISMISS

Defendants through their attorney, the United States Attorney for the District of Columbia respectfully move the Court to dismiss the above entitled cause for failure to state a claim over which this Court has jurisdiction or upon which it can grant relief.

/s/ THOMAS A. FLANNERY
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ Ellen Lee Park
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

TEMPORARY RESTRAINING ORDER

It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, should issue because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim,

NOW, THEREFORE, IT IS ORDERED, that the Temporary Restraining Order issued by this Court at twelve o'clock p.m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders.

IT IS FURTHER ORDERED that a copy of this Order be served by the United States Marshal on Defendants forthwith.

/s/ Oliver Gasch
United States District Judge

Issued at 3:08 o'clock, p.m., this 4th day of June, 1971.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1053-71

JEANNE M. MURRAY, PLAINTIFF

v.

ROBERT L. KUNZIG, and A. F. SAMPSON, DEFENDANTS

Washington, D. C.

June 4, 1971

The above-entitled cause came on for hearing, pursuant to notice, before the HONORABLE OLIVER GASCH, United States District Judge, at 2:00 p.m.

APPEARANCES:

On behalf of the Plaintiff:
THOMAS J. MCGREW, ESQ.

On behalf of the Defendants:
ELLEN LEE PARKS, ESQ.

PROCEEDINGS

THE DEPUTY CLERK: Civil Action 1053-71, Murray versus Kunzig.

MR. McGREW: If Your Honor please, the crux of this case is one of the regulations that the probationer has a right not to be terminated in all or in part for reasons based on prior conduct without the probationer's having noticed.

The other part of this case, Your Honor, the probationer would show she was terminated. The reason the Court granted T.R.O. was this issue concerning the prior employment.

THE COURT: I am inclined to agree with you. Mrs. Parks the reason the Court granted the T.R.O. concern-

ing this issue or prior employment. I would like to be certain that the G.S.A. people are clean on this. It is one thing to say, "Yes, we knew all the prior employment," and another thing to say, "We knew about it and we didn't take it into consideration." You expect the Government—I am not talking about you, I am talking about the Government—to be candid with the Court under these circumstances, and there are plenty of people in the Government and I know them, and I am sure you know them that seek to avoid the impact of a regulation by saying, "Oh, no, we didn't have that conduct in mine, we just recognized what we did in our agency." That is the point about this case.

MRS. PARKS: Well, Your Honor, I myself convey the view to the agency if they had any doubt that she was entitled to this regulation, in my opinion, they should give serious consideration to giving her these features. They satisfied me, Your Honor, that the decision was based solely on her conduct.

Now, this memo upon which plaintiff relies is a recommendation to the deciding authority. It is not a decision of the deciding authority. The decision of the deciding authority gives two reasons, and those are based on her conduct with the agency.

THE COURT: Is it reasonable to assume that the "Deciding Authority," knew that the regulation was enforced and in effect and if any mention were made of it, that he would have to go through procedures which are considerably more onerous.

MRS. PARKS: He did not mention—well, yes.

THE COURT: Well, whether he mentioned it, it is a question whether he had it in mind.

MRS. PARKS: Well, we could only tell that by psychoanalyzing as counsel suggest. Mr. Sanders has been out of town all week. An affidavit was prepared for his signature, and he was advised by me by phone, and he won't sign it. He based his decision solely on her conduct with the agency during the time she was employed. If the affidavit will satisfy you any better than his letter, we will submit that. I submit there is no way in the world for this Court or anybody else can determine

what was in his mind other than what he tells us. He is prepared to give an affidavit to that effect.

What is more, Your Honor, if there is some merit to this point, plaintiff must pursue her remedies before the civil service commission before this Court has any equitable jurisdiction.

The cases are legion on this, and I am prepared to give you even additional ones to those we cited in the memorandum. This Court has no jurisdiction to consider this matter at this juncture when plaintiff has pending before the civil service commission an appeal from that action.

THE COURT: I remember something an old friend of mine use to tell me when I was District Attorney. I am referring to Judge Pine.

MRS. PARKS: He was a friend of mine.

THE COURT: Judge Pine use to say, "I may be impotent, but I don't like the Government lawyers telling me I am." and that is the way I fell about this no jurisdiction business.

MRS. PARKS: Well, if Your Honor please, the cases are uniform in that in the Supreme Court up and down, even the First Circuit which decided the Wetter Case has changed its view, and I have the case on that where they now adopt the view which is true in this jurisdiction that until administrative remedies are exhausted, this Court has no power to act in these matters.

The Supreme Court said so in Myers and said the District Court erred in granting an injunction, the Court of Appeals should have reversed it on lack of jurisdiction. The First Circuit said after the Wetter Case and said it after the Fitzpatrick Case. The Court of Appeals has said it over and over again.

With all due respects to Your Honor, I think you should consider these cases binding on you.

THE COURT: All right. What do you have to say about my impudency?

MR. McGREW: If Your Honor please, I think the cases are very legion to say Your Honor is very virile in this case. I think Your Honor that might help to clarify, I think we might be talking about cross purposes a little bit.

On the one hand, there is a whole string of cases that counsel for the defense has cited on the question of primary jurisdiction and civil service commission and so on.

We would prefer to keep out of that morass, Your Honor, and get into the straight question of the court of equity's power to issue an injunction pending a decision by the administrative agency itself. The cases are legion on that when that occurred. If you attempt to read the Young Case for the proposition that you can't get into Court at all, I think our Court of Appeals has rejected that reason. In the Ogden versus Zuker, the same argument was made, and the Court said the secretary relies on young and hagley. None of this seems to be quite in point. The administrative remedy available in that case was prior to the administrative action becoming final which is not our situation.

THE COURT: Administrative action is not final in this case. It would have been but for the T.R.O.

MR. McGREW: But for the T.R.O., it would have been final. We are not asking Your Honor to go so far as to oust the deciding authority. We are asking Your Honor to give some relief pending a decision as to retain jurisdiction hopefully after that decision.

THE COURT: Mrs. Parks, the advice you gave GSA, of course, I know that agencies don't always follow the advice they get from experienced Government counsel, but they follow the regulations which plaintiff says that is applicable in which they deny. It probably would be not only the fairest way but the most justly to solve the problem.

MRS. PARKS: I want to correct any misapprehension, Your Honor, I did not advise them, I said if they were not satisfied that the sole reason for her discharge, I suggested that. They have conferred with everybody concerned and are satisfied they even called long distance to the man who made the decision. They are satisfied it was his decision, and as Your Honor knows, our office does not interfere in the internal management of an agency if that is there decision. I cannot go behind his mind, and I don't believe anybody else can, but again, I urge upon Your Honor that this doctrine and also with

respect to keeping her on the payroll. The First Circuit has spoken on that and I have a decision in the Fitzpatrick Case if Your Honor would like to look at it where Chief Justice McGruder said it would constitute an uncontested suit because you are paying money out of the U.S. Treasury, causing money to be paid out where there is no consent. Congress has specifically provided by the back pay statute that these people should be reimbursed subsequent to final litigation and not during it.

THE COURT: I always remember the years when I was U.S. Attorney, conversations with Mr. Philip Young who is a close personal friend who is chairman of the civil service commission, and he was upset about many of these decisions in which judges unwarrantly interfered with the operations of his commission and other government agencies. I said to him at that time, "You've got so many protective regulations that are on the books and are binding on you, it is might as well wipe them all off if you act the way you want to act," but they never did. And time and time again, we see the Government voted to act expeditiously afforded by a regulation they don't want to follow.

MRS. PARKS: If Your Honor please, I believe every regulation has been followed in this case.

THE COURT: Well, that is what this man who is presently unavailable as a witness said. The thing that strikes me is that the paper which you filed with me that consideration was given to her prior employment.

MRS. PARKS: By the man recommending dismissal to the deciding authority.

THE COURT: To whom did he forward his recommendation?

MRS. PARKS: To the deciding authority and it eventually reached him. The deciding authority said, "I decided solely on her conduct while she was there."

THE COURT: How do I know that?

MRS. PARKS: He says so.

THE COURT: Well, time has long since passed I believe everything a witness tells me.

MRS. PARKS: If Your Honor please, that is what the record says and that is what is before you. In the

Environmental Defense fund, the Court of Appeals says the Court must accept the reasons given by the agency. Judge Bazelon has said the Court must accept the reasons given by the agency, not what might have been a reason. There are many cases on that, Your Honor.

THE COURT: Well, I remember a statement often attributed to Judge Goldberg of this Court many years ago. As you recall, he didn't care much for psychiatrist. He was one of the few judges who had a certificate showing he was sane, because he had extensive experience with psychiatrists at an earlier date. I can remember him presenting cases before him, and when he would instruct a jury, he would raise a piece of paper like that and say, "Ladies and gentlemen, you have heard the testimony of Dr. X. He is an eminent psychiatrist and I have told you about expert witness testimony. You should give due consideration to that, but he says, ladies and gentlemen, you can see the color of this piece of paper. If somebody tells you it is blue you don't have to believe it. Take the case ladies and gentlemen."

They usually got the point.

MRS. PARKS: There you have a witness before Your Honor, and you are able to hear—

THE COURT: I believe we had better have this witness before the Court.

MRS. PARKS: I would object to that, Your Honor, the cases are legion on that, the cases reviewed on the administrative record and not by witnesses—

THE COURT: I will hear the testimony of the witness. I will make up my mind as to whether he is telling the truth.

MRS. PARKS: If Your Honor please, you want to call him as your witness, Your Honor?

THE COURT: I don't have any objection. I have extensive experience with GSA people in the past. I will probably have more experience in the future.

MRS. PARKS: If Your Honor please, I consider that it would be error for you to endeavor to ascertain the merits of a case in this matter. I would object to it, Your Honor.

THE COURT: All right, Mrs. Parks, your objection is noted.

MRS. PARKS: Very well.

THE COURT: When is he going to be available?

MRS. PARKS: To my understanding, he will be in town on the 7th of June.

THE COURT: Where is he now?

MRS. PARKS: He is out of town. As I understand he is on annual leave. I don't know exactly where.

THE COURT: California is about six hours away.

MRS. PARKS: Well, I would like to find out where he is, but I don't know.

THE COURT: All right, I will hear from him. Let me know when he can be available.

MRS. PARKS: Very well. In the meantime—

THE COURT: The T.R.O. will be continued until he shows up.

THE DEPUTY CLERK: Do you want to present an order on that, Mr. McGrew?

MRS. PARKS: We would like an increase in bond now, Your Honor. The record shows this woman's salary and the bond is not sufficient to cover the expenses of the Government. She is paid better than $350.00.

THE COURT: Let the man come in and I will hear him today.

MRS. PARKS: I have no assurance we can get in touch with him, Your Honor.

THE COURT: Tell the agency I will continue the temporary restraining order until the witness appears.

MRS. PARKS: Without any increase in the bond?

THE COURT: Right, because the Government has within its power to bring him in.

MRS. PARKS: I don't know what power we have. He is on annual leave, and I don't know how we can even get in touch with him.

THE COURT: Annual leave doesn't mean anything to me. We all take leave, we can all show up when necessary.

MRS. PARKS: I will see what I can do.

THE COURT: Thank you, Mrs. Parks.

MR. McGREW: We don't have an order for your Honor.

THE COURT: Will you have one here today?

MR. McGREW: We will have it here.

(Whereupon, at 2:18 p.m. the above-entitled cause adjourned sine die.)

CERTIFICATE OF OFFICIAL REPORTER

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Duane B. Duschaine
DUANE B. DUSCHAINE
Official Reporter

SUPREME COURT OF THE UNITED STATES

No. 72-403

ROBERT L. KUNZIG, Administrator, General Services Administration, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

ORDER ALLOWING CERTIORARI—Filed March 19, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 505468 680